133.

SUPREME COURT OF THE UNITED STATES.

No. 22.

JOHN W. HAMILTON ET AL., PLAINTIFFS IN ERROR,

VERSUS

THOMAS KIRKMAN, JR.

ON A CERTIFICATE OF DIVISION IN OPINION OF THE JUDGES OF THE CIRCUIT COURT UNITED STATES FOR THE DISTRICT OF WEST TENNESSEE.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	2
Title	5	2
Declaration	5	3
Nul tiel record—Payment—Replication and issue	7	3
Amended declaration of Thomas Kirkman	7	4
Nil debit, and statute of limitations	9	5
Replication	13	5
Demurrer to defendants' second plea	14	6
Copy of the record on which the suit is predicated	15	7
Verdict	34	19
Points of division	36	19
Clerk's certificate	36	20

THE UNITED STATES, ss.—*The President of the United States to the Judge of the Circuit Court of the United States for the District of West Tennessee, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment, of a plea, which, in the said circuit court, before you or some of you, between Thomas Kirkman, jr., plaintiff, *vs.* John W. Hamilton and Thomas Donoho, defendants, in debt, a manifest error hath happened, to the great damage of the said defendants, as by defendants' complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things

concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 3d Monday of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected by the said Supreme Court, may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable John Marshall, Chief Justice of the said Supreme Court, the first Monday of January, in the year of our Lord one thousand eight hundred and twenty-nine, and of the independence of the United States the fifty-third.

N. A. McNAIRY,
Clerk of the Circuit Court for the District of West Tennessee.

THE UNITED STATES, SEVENTH CIRCUIT, DISRTICT OF WEST TENNESSEE.

To Thomas Kirkman, jr., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 3d Monday in January next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 7th circuit, in the district of West Tennessee, wherein John W. Hamilton and Thomas Donoho are plaintiffs in error, and defendant, to shew cause, if any there be, why the judgment rendered against the said Thomas Kirkman, jr., defendant, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Marshall, Chief Justice of the Supreme Court of the United States, on this Monday of January, in the year of our Lord one thousand eight hundred and twenty-nine, and of the independence of the United States the fifty-third.

N. A. McNAIRY, *Clerk.*

COUNTY, ss.

On this day of , in the year of our Lord one thousand eight hundred and twenty , personally appeared before me , and being duly sworn, deposeth and saith, that on the day of , he delivered a true copy of the above citation to .

Pleas at Nashville for the seventh circuit of the United States in the district of West Tennessee, before the Honorable John McLean, Esq., Associate Justice of the Supreme Court of the United States, and the Honorable John McNairy, Esq., Judge of the courts of the United States for the districts of East and West Tennessee, at June term, being the tenth day of June, in the year one thousand eight hundred and twenty-nine, and of the independence of the United States the fifty-third.

THOMAS KIRKMAN, jr., *plaintiff,*
versus
JOHN W. HAMILTON and THOMAS DONOHO, *defendants.* } *In debt.*

John W. Hamilton and Thomas Donoho, who are citizens of the State of Tennessee, and inhabitants of the district of West Tennessee, were attached

134.

to answer Thomas Kirkman, jr., who is a citizen of the State of Alabama, of a plea that they render to him three thousand dollars, which to him they owe, and from him unjustly detains, to his damage of five hundred dollars.

Whereupon the plaintiff filed his declaration, which is in the words and figures following, to wit:

Circuit Court of the United States for the District of West Tennessee—April rules, 1823.

Thomas Kirkman, jr., who is a citizen of the State of Alabama, by attorney, complains of John W. Hamilton and Thomas Donoho, who are citizens of the State of Tennessee, in custody, &c., of a plea that they render to him the sum of three thousand dollars, which to him they owe, and from him unjustly detain. For that whereas the said Thomas Kirkman, jr., heretofore, to wit, on the 21st day of June, 1820, in the first judicial district court for the State of Louisiana, the said court being then and still holden in the city of New Orleans, to wit, in the district aforesaid, by the consideration and judgment of said court recovered against the said John W. Hamilton and Thomas Donoho, (the said John W. Hamilton being called John Hamilton in said proceeding) the sum of three thousand dollars above demanded, which, in and by the said court, were then and there adjudged to the said Thomas Kirkman, jr., together with interest thereon from the day of the judicial demand, to wit, the 16th day of May, 1820, till paid, together with costs and charges by him about his suit in that behalf expended, which said judgment of the first judicial district court of the State of Louisiana, was, on the 6th day of April, 1821, by the Supreme Court of the said State of Louisiana, holden in the city of New Orleans, to wit, in the district of West Tennessee aforesaid, affirmed, with costs, as by the records and proceedings remaining in said court more fully appears; which said judgment still remains in full force and effect, not reversed, satisfied, or otherwise vacated; and the said Thomas Kirkman, jr., hath not obtained any execution or satisfaction of or upon said judgment so recovered as aforesaid, whereby an action hath occurred to the said Thomas Kirkman, jr., to demand and have of and from the said John W. Hamilton and Thomas Donoho the said sum of three thousand dollars, together with interest thereon till paid, above demanded, yet the said John W. Hamilton and Thomas Donoho, although often requested so to do, hath not as yet paid the aforesaid said sum of money or any part thereof, to the said Thomas Kirkman, jr.; but they to do this hath hereunto wholly failed and refused, and still doth, to the damage of the said Thomas Kirkman, jr., five hundred dollars; and therefore he brings suit.

THOMAS WASHINGTON,
Attorney for plaintiff.

And the said John W. Hamilton comes and defends the wrong and injury when, &c., and saith there is no such records of proceedings as the plaintiff has in his declaration alleged; and this he is ready to verify: wherefore, &c., by

GILES and FOGG,
His attorneys.

Replication and issue.

WASHINGTON.

Also, payment on the 8th April, 1821.

GILES and FOGG.

Replication and issue.

WASHINGTON.

The amended declaration of Thomas Kirkman, jr., who is a citizen of Alabama, against John W. Hamilton and Thomas Donoho, who are citizens of Tennessee, filed in the circuit court of the United States for the district of West Tennessee at March rules, 1825. And the said Thomas Kirkman, jr., who is a citizen of Alabama, by attorney, complains of John W. Hamilton and Thomas Donoho, who are citizens of Tennessee, in custody, &c., of a plea that they render to him three thousand dollars, which to him they owe, and from him unjustly detain. For that whereas the said John W. Hamilton and Thomas Donoho, being merchants and copartners in trade, carrying on business under the firm and style of *Hamilton & Donoho*, on the 22d day of September, 1818, at the district of West Tennessee aforesaid, made their certain promissory note in writing, signed with their said partnership name of *Hamilton & Donoho*, by which they then and there promised to pay, fifteen months after the date thereof, to Thomas Ramsey & Co. or order, the aforesaid sum of $3,000, for value received; which said promissory note is now here to the court shown, and then and there delivered the said promissory note to the said Thomas Ramsey & Co. And afterwards, to wit, on the day of , at the district aforesaid, the said Thomas Ramsey & Co. having become citizens of Alabama, and the said note being unpaid, by their written endorsement thereon to the name of Thomas Ramsey & Co. being thereto subscribed, endorsed the said promissory note; which said endorsement is now here to the court shown; by which said endorsement, the said Thomas Ramsey & Co. then and there ordered and appointed the said sum of money in said promissory note specified to be paid to the said Thomas Kirkman, jr., or order, for value received, and then and there delivered the said promissory note, so endorsed, to the said Thomas Kirkman, jr. By means whereof, and by force of the laws in such case made and provided, a right has accrued to the said Thomas Kirkman, jr., to have and maintain this action. Yet, though requested, the said *John W. Hamilton and Thomas Donoho* have not paid the aforesaid sum of money to the said Thomas Kirkman, jr., to his damage of five hundred dollars; and therefore he brings suit. And whereas, also, the said John W. Hamilton and Thomas Donoho, being citizens of Tennessee, as aforesaid, afterwards, to wit, on day of , at the district aforesaid, accounted with the said Thomas Kirkman, jr., being a citizen of Alabama, as aforesaid, of and concerning divers other sums of money before that time and then due and owing, and in arrear and unpaid, from the said John W. Hamilton and Thomas Donoho to the said Thomas Kirkman, jr.; and, upon that accounting, the said John W. and Thomas were then and there found to be in arrear and indebted to the said Thomas Kirkman, jr., in the further sum of three thousand dollars, to be paid by the said John W. Hamilton and Thomas Donoho to the said Thomas Kirkman, jr., when they, the said John W. Hamilton and Thomas Donoho, should be thereunto afterwards requested: whereby, and by reason of the said last mentioned sum of money being and remaining unpaid, an action hath accrued to the said Thomas Kirkman, jr., to demand and have of from the said John W. Hamilton and Thomas Donoho in the said last mentioned sum of three thousand dollars. Yet the said John W. Hamilton and Thomas Donoho, although often requested, have not paid the said last mentioned sum of money to the plaintiff, to his damage of five hundred dollars; and therefore he brings suit.

THOMAS WASHINGTON,
Attorney for plaintiff.

Pleas—Nil debit, and statute of limitations. F. L. FOSTER.

136.

And at rules holden at the clerk's office for the month of May, 1825, said Hamilton and Donoho comes and files the several pleas in the words and figures following, to wit:

Thomas Kirkman, jr., vs. *Hamilton and Donoho.*

And the defendants come and defend the wrong and injury, when, &c., and say they do not owe the sums of money specified in the second and third counts of the plaintiff's declaration, or any part thereof, in manner and form as the plaintiffs hath above thereof declared against them; and of this they put themselves on the country, by

FOGG, *their attorney.*

And for further plea to the said second and third counts, the defendants say, the plaintiff his action aforesaid ought not to have and maintain because they say that the said causes of action in said counts specified, or either of them, did not accrue to the plaintiffs at any time within three years before the commencement of this suit; and this they are ready to verify: wherefore they pray judgment if the plaintiff his action against them ought to have and maintain, by

FOGG, *their attorney.*

And for further plea to the first count of the plaintiff's declaration, the defendants say, that the plaintiff his action aforesaid against them, in his first count specified, ought not to have or maintain, because they say, that, at the time of issuing the process and the rendition of the pretended judgment in said count mentioned, they were citizens and inhabitants of Smith county, in the State of Tennessee, of which State the plaintiff was also then a citizen, and in which State the contract upon which said pretended judgment purports to be founded was made; that the original suit or process in the action in which said judgment was rendered, was no otherwise served on the defendants than by serving a copy of the writ and process upon one Henry Jackson, of New Orleans, and attaching in his hands the goods and chattels, lands and tenements, rights, credits, moneys, and effects of these defendants, which he might have in his possession, sufficient to satisfy the plaintiff in his demand; and the defendants aver that at the time when said writ and process issued, and at the time when it was served, and at the time said judgment was rendered, the said Henry Jackson had not in his possession any goods, chattels, lands, and tenements, rights, credits, moneys, or effects of these defendants, or either of them; and that these defendants, or either of them, did not appear to said action, or had any notice of the same, or take upon themselves its defence; and that the said district court in and for the first judicial district of the State had no jurisdiction over these defendants, or any power to enter judgment against them or either of them; and this they are ready to verify: wherefore they pray judgment, &c. by

ANDERSON and BUCKS,
Their attorneys.

And the said Thomas Kirkman, jr., as to the plea of the said defendants, by them fourthly above pleaded, saith, that, by reason of any thing by them, the said John W. Hamilton and Thomas Donoho, in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against them, because he saith that, (protesting that the said district court in

and for the first judicial district of the State of Louisiana, had, at the time of rendering said judgment, jurisdiction over the said defendants, and power to enter up said judgment against them) notwithstanding, at the time of issuing the process and rendering the judgment aforesaid, the said defendants and the said plaintiff were citizens and inhabitants of the State of Tennessee, and the note upon which said judgment was founded was made in the State of Tennessee, and, notwithstanding the original writ or process in the action in which said judgment was rendered, or a copy thereof, was only served on Henry Jackson as garnishee, and the property of the said defendants thereby attached; yet the plaintiff avers, that, at the time of such service, the said defendants had property in the hands of said Henry Jackson, which was thereby attached, and the levying of which attachment, together with the appointment of counsel for the defendants by the court, and the appearance of that counsel in the cause, was equivalent to the personal service of process, and gave the said court power to act in personam, as by the record and proceedings in said cause will more fully appear; and this he prays may be inquired of by the country, by, &c.

THOMAS WASHINGTON,
Attorney for plaintiff.

The paper referred to as a record part of this plea by consent.
And defendants also.

And the said Thomas Kirkman, jr., as to the plea of the said John W. Hamilton and Thomas Donoho, by them first above pleaded, to the amended declaration of the said Thomas Kirkman, jr., and whereof they, the said John W. Hamilton and Thomas Donoho, who have put themselves upon the country, by the said Thomas Kirkman, jr., doth the like.

THOMAS WASHINGTON,
Attorney for plaintiff.

And the said Thomas Kirkman, jr., as to the plea of the said John W. Hamilton and Thomas Donoho, by them secondly above pleaded, to the amended declaration of him, the said Thomas Kirkman, jr., saith, that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said Thomas Kirkman, jr., from having or maintaining his aforesaid action thereof against them, the said John W. Hamilton and Thomas Donoho; and that he, the said Thomas Kirkman, jr., is not bound by the law of the land to answer the same; and this he, the said Thomas Kirkman, jr., is ready to verify: wherefore, for want of a sufficient plea in this behalf, the said Thomas Kirkman, jr., prays judgment, and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, to be adjudged to him, &c. And the said Thomas Kirkman, jr., according to the form of the statute in such case made and provided, states and shews to the court here the following causes of demurrer to the said second plea, that is to say, 1st. Said plea does not state that this is an action of debt for arrearages of rent; 2d. Said declaration is not in debt for arrearages of rent. 3d. The cause of action sued upon is not arrearages of rent; and, also, the said second plea is, in other respects, uncertain, informal, and insufficient.

THOMAS WASHINGTON,
Attorney for plaintiff.

Joinder in demurrer.

FOGG.

The following is a copy of the record upon which this suit was predicated, and was read in the cause on the trial.

STATE OF LOUISIANA, FIRST JUDICIAL DISTRICT COURT.

Be it remembered, that, on the 16th day of May, in the year of our Lord 1820, into the district court in and for the first judicial district of the State of Louisiana, holden in the city of New Orleans, came Thomas Kirkman, jr., by Samuel Livermore, Esq., his attorney, and filed the following petition, to wit:

Petition.

To the Honorable Joshua Lewis, Judge of the district court for the first judicial district of the State of Louisiana, the petition of Thomas Kirkman, jr., of the State of Tennessee, respectfully sheweth:

That John Hamilton and Thomas Donoho, of said State of Tennessee, partners, trading under the firm of Hamilton and Donoho, are justly indebted to your petitioner in the sum of three thousand dollars, for that the said defendants, on the 22d day of September, 1818, made their promissory note, by them subscribed, bearing date the same day and year, by which said defendants, by the name of Hamilton and Donoho, promised, fifteen months after date, to pay to Thomas Ramsey & Co. or order, three thousand dollars for value received, which said promissory note the said Thomas Ramsey & Co. afterwards endorsed and delivered to your petitioner, whereby the said Hamilton and Donoho became liable for the amount of said note to your petitioner, as will more fully appear by the annexed promissory note, which your petitioner prays may be taken as part of this petition; and being so indebted, the said Hamilton and Donoho, in consideration thereof, undertook and promised to pay the same when requested; yet, though often and amicably requested, the same Hamilton and Donoho have refused to pay the same, whereby your petitioner has sustained damage. And your petitioner further humbly represents, that the said Hamilton and Donoho reside permanently out of this State, and that they have property within the jurisdiction of this honorable court: your petitioner therefore prays that the premises and annexed bond and affidavit being seen and considered, a general attachment may issue against the lands, tenements, goods, chattels, moneys, and effects of the said Hamilton and Donoho; and that Henry Jackson may be made a garnishee, and compelled to answer on oath the annexed interrogatories; and that the said Hamilton and Donoho may be cited to appear and answer to the complaint of your petitioner, and decreed to pay the said sum of three thousand dollars, with interest and costs; and for such other and further relief as the equity of your petitioner's case may require, &c.

SAMUEL LIVERMORE.
For the petitioner.

Thomas Kirkman, jr., the petitioner, maketh oath that the facts stated in the foregoing petition are true, as he believes, and that the defendants are justly indebted to the petitioner in the sum of three thousand dollars, and that the said defendants reside permanently out of the State.

THOMAS KIRKMAN, Jr.

Sworn to and subscribed this 16th day of May, 1820, before me,
N. FARRIE, *by Clerk.*

Interrogatories.—1st. Have you in your hands or possession, or under your control, any lands, tenements, goods, chattels, moneys, effects, or credits of the defendant?

2d. Are you in any manner indebted to the defendants?

3d. Do you know of any person within the jurisdiction of this court who has in his possession or under his control any property of the defendants?

4th. Do you know of any person within the jurisdiction of this court who is indebted to the defendants?

Bond.

Know all men by these presents, that we, Thomas Kirkman, jr., of Tennessee, and James M. Reynolds, of the city of New Orleans, and State of Louisiana, are held and firmly bound unto Hamilton and Donoho in the sum of $6,000, lawful money of the United States of America, to be paid to the said Hamilton and Donoho, their executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us, by himself, our, and each of our heirs, executors, and administrators, firmly by these presents: sealed with our seals, and dated the 15th day of May, in the year of our Lord 1820: whereas Thomas Kirkman, jr., hath this day presented a petition to the honorable the district court of the State of Louisiana in and for the first judicial district, praying an attachment against the property of said Hamilton and Donoho; now, the condition of the above obligation is such, that, if the above bound Thomas Kirkman, jr., shall well and truly pay or cause to be paid to the said Hamilton and Donoho, the defendants in said attachment, all such damages as the said Hamilton and Donoho shall or may suffer in case it shall appear that the said attachment hath been wrongfully sued out, then the above obligation to be void, else to remain in full force and virtue.

THOS. KIRKMAN, Jr. [SEAL.]
JAS. M. REYNOLDS, [SEAL.]

Signed, sealed, and delivered, in the presence of

Orinal note delivered up to plaintiff's attorney, as by the following receipt on the petition: Received the note annexed.

S. LIVERMORE, *for plaintiff.*

Attachment.

THE STATE OF LOUISIANA, FIRST JUDICIAL DISTRICT COURT.

To the sheriff of the Parish of New Orleans:

Whereas due proof has been made before the district court of the State of Louisiana in and for the first judicial district thereof, by Thomas Kirkman, jr., that Hamilton and Donoho are indebted to him in the sum of three thousand dollars, and that the said Hamilton and Donoho reside permanently out of the State of Louisiana; now, therefore, you are commanded to seize and take into your possession the goods and chattels, lands and tenements, rights, moneys, effects, and credits of the said Hamilton and Donoho in the said district, to an amount sufficient to secure the payment of the said sum; and that you give notice by leaving a copy of the writ at the last place of abode of the said Hamilton and Donoho in the district aforesaid, and causing another copy thereof to be put at the church door of the district in which

they last resided; and in what manner you have executed this writ you make return thereof to our said court on the first Monday in June next, holden in the city of New Orleans.

Witness Joshua Lewis, Judge of the said court, this 16th day of May, in the year of our Lord 1820, and in the forty-fourth year of the independence of the United States.

H. FARRIE, *Deputy Clerk.*

Sheriff's return on attachment.

Served copy of petition, citation, attachment, and interrogatories on Henry Jackson, May 16, 1820, at half past eleven o'clock A. M., and attached in his hands the goods and chattels, lands and tenements, rights, credits, moneys, and effects of the defendants, which he might have in his possession, sufficient (if so much he had) to satisfy the plaintiff in his demand; posting, at the same time, copies of this writ at the door of a church situated in front of the public square in the city of New Orleans.

Returned May 17, 1820.

J. H. HOLLAND, *Deputy Sheriff.*

Citation.

THE STATE OF LOUISIANA, FIRST JUDICIAL DISTRICT COURT.

Mr. Henry Jackson: You are hereby summoned to appear at the office of the sheriff of the parish of New Orleans, and comply with the prayer of the annexed petition, or file your answer thereto, in writing, in the office of the clerk of the first judicial district court, at the city of New Orleans, in ten days after the service hereof.

Witness the Honorable Joshua Lewis, Judge of the said court, the 16th day of May, in the year of our Lord 1820.

H. FARRIE, *Deputy Clerk.*

Sheriff's return on citation.

Served copy of petition, citation, attachment, and interrogatories on Henry Jackson, May 16, 1820, at half past eleven o'clock A. M.

Returned May 17, 1820.

J. H. HOLLAND, *Deputy Sheriff.*

Afterwards, to wit, on the eighteenth day of the said month of May, in the year aforesaid, at a session of the court aforesaid, holden as aforesaid, the following order was entered upon record, to wit:

Order.

THOMAS KIRKMAN, jr., *vs.* HAMILTON and DONOHO.

On motion of S. Livermore, Esq., of counsel for the plaintiff, thereupon, ordered by the court that J. A. Mayben, Esq., be appointed to defend the interest of the defendants, who reside permanently out of the State of Louisiana. No. 3255.

Afterwards, to wit, on the 25th day of May, in the year last aforesaid, into the court aforesaid, holden as aforesaid, came Henry Jackson, garnishee, and filed the following answers to interrogatories, to wit:

Answer of garnishee.

THOMAS KIRKMAN, jr., *vs.* HAMILTON and DONOHO.

Henry Jackson, summoned as garnishee in the above suit, to the interrogatories proposed to him on the part of the plaintiffs, answers and says:

To the first interrogatory—That the mercantile house of which he is a partner have received from the said Hamilton and Donoho, between the 11th day of April and 19th day of May, of this present year, 134 hogsheads of tobacco, out of which they delivered to Mr. Hamilton, on the 10th, - - - - 10 hogsheads.

That they have sold - - -	104	do. the gross sales of which are, -	$5,077 26
That they have sold loose tobacco amounting to - - - - -		- - -	39 92
That they have in store sold, but not yet weighed and delivered, 18 hogsheads of 2d quality suspended and × tobacco; also 2 hogsheads unsold - -	20	probably nett,	700 00
	134	hogsheads.	$5,817 18

On this tobacco they have for sundry charges amounting to	$257 06	
Bill of storage, labor, and weights, not ascertained, say -	110 00	
Our commission on sales at 2½ per cent. - -	145 00	
		512 48
Probable nett proceeds,		$5,304 70

That the above is all the property belonging to the defendants which they have had in their possession or under their control; and the said defendants were, at the time of service of the writ of attachment, justly indebted to the house of which your respondent is a partner in the sum of five thousand five hundred and ninety-five dollars ninety-seven cents; for which sum your respondents have a privilege and claim on the said tobacco and its proceeds, now in the hands of your respondents.

To the 2d interrogatory, he answers—No.
To the 3d " " " No.
To the 4th " " " No.

HENRY JACKSON & Co.

Sworn to and subscribed before me, this 24th day of May, 1820.

H. FARRIE, *Deputy Clerk.*

Afterwards, to wit, on the thirty-first day of May, in the year last aforesaid, into the court aforesaid, holden as aforesaid, came the plaintiff by his attorney, and filed the following exceptions to the answer of the garnishee, to wit:

Exceptions.

THOMAS KIRKMAN, jr., *vs.* HAMILTON and DONOHO.

The plaintiff, by his counsel, excepts to the answer of Henry Jackson, garnishee in this case, for these causes:

1st. That said answer has not set forth the times and sums at and for which said tobacco was sold.

138.

2d. That said answer does not state the particular charges claimed to be deducted.

3d. That the said answer does not state the nature and cause of the debt of five thousand five hundred and ninety-five dollars and ninety-seven cents, for which said garnishee claims a privilege upon said tobacco and its proceeds; nor does said answer state at what time and place said debt accrued.

Wherefore the said plaintiff prays that said Henry Jackson may be compelled to answer particularly to the matter stated in these exceptions; or that, in default thereof, that the interrogatories put in the plaintiff's petition may be taken for confessed, and that judgment may be entered against said garnishee for the amount of the petitioner's demand.

S. LIVERMORE, *for plaintiff.*

Afterwards, to wit, on the eighth day of June, in the year last aforesaid, into the court aforesaid, holden as aforesaid, came Henry Jackson, garnishee, and filed the following account, to wit:

Account.

Sales of one hundred and thirty-four hogsheads of tobacco, by order and for account and risk of Messrs. Hamilton and Donoho.

1820. May 4,	To R. H. McNair, 434 lbs. loose tobacco, at 2¼ -		$9 76
5,	To Mansel White & Co., 8 hhds., ×		
	1,610 1,400 1,130		
	1,330 1,490 1,345		
	1,190 1,290		
	——— ——— ———10,775		
	Tare, 10 per cent., 1,077		
	———9,698 lb. at 2½,	242 45	
	Less 2 per cent., - - -	4 85	
		———	237 60
16,	To Robert Dyson, 10 hogsheads,		
	1,150 1,445 1,230		
	1,820 1,670 1,580		
	1,620 1,545 1,545		
	1,375		
	——— ——— ———14,980		
	Tare, 10 per cent., 1,498		
	———13,482, at 4, -		539 28
	½ inspection and cooperage, - - -		8 75
17,	To Benjamin Story, 19 hogsheads,		
	1,350 1,275 1,300		
	1,375 1,300 1,430		
	1,245 1,445 1,290		
	1,355 1,360 1,370		
	1,415 1,235 1,680		
	1,315 1,190 1,385		
	1,370		
	——— ——— ———25,685		
	Tare, 10 per cent., 2,568		
	———23,117, at 4⅜, -		1,011 37
	½ inspection and cooperage, - - -		16 63

1820. May 18, To Benjamin Story, 6 hogsheads,

1,315	1,445	1,410	
1,295	1,220	1,410	
			8,095
Tare, 10 per cent.,			809
		7,286 lbs. at $4\frac{3}{8}$, -	318 76
$\frac{1}{2}$ inspection and cooperage, - - -			5 25
To R. H. McNair, 500 lbs. loose tobacco, at 2, -			10 00

19, To Benjamin Story, 36 hogsheads,

1,205	1,690	1,360	
1,100	1,525	1,170	
1,420	1,225	1,440	
1,615	1,465	1,480	
1,725	1,600	1,250	
1,395	1,110	1,390	
1,430	1,570	1,340	
1,495	1,285	1,560	
1,395	990	1,345	
1,720	1,380	1,565	
1,340	1,455	1,680	
1,730	1,170	1,110	
			50,755
Tare, 10 per cent.,			5,075
		45,680, at $4\frac{3}{8}$, -	1,998 50
$\frac{1}{2}$ inspection and cooperage, - - -			31 50

23, To Levi Beebe, 25 hogsheads,

1,150	1,385	1,565	
1,160	1,080	1,725	
1,340	1,325	1,690	
1,165	1,455	1,590	
1,135	1,280	1,335	
1,330	1,535	1,050	
1,430	1,025	1,530	
1,335	1,350	1,130	
1,270			
			33,365
Tare, 10 per cent.,			3,336
		30,029, at 3, -	900 87
$\frac{1}{2}$ inspection and cooperage, 10 hhds., 25,			8 75
24, To William Kearr, 1,008 loose tobacco at 2,			20 16

26, To Gilbert and Martineau, 60 days, 18 hhds.,

1,260	1,255	1,120	
1,350	1,215	1,410	
1,275	1,375	1,600	
1,250	1,330	1,390	
1,010	1,190	1,220	
1,310	1,540		
			22,100
Tare, 10 per cent.,			2,210
		19,890 lb. at 3, -	596 70
1,655			
Tare, 165			
		1,490, at $2\frac{3}{4}$ - - -	40 97

13

½ inspection and cooperage on 17 hhds.,	-	$14 88
		$5,769 7[illegible]

10 hogsheads delivered Mr. Hamilton, 2 hogsheads remaining on hand.

Charges.

Paid freight 6 hogsheads, 7,980 lbs., 1,	-	$79 80
drayage 51 hogsheads, and do. samples,	-	15 63
inspection and cooperage on 101 hogsheads, $1 50	-	151 50
labor on loose tobacco, and storing 14 hogsheads,	-	2 13
for unloading one boat,	-	8 00
storage, labor, and weighing,	-	73 75
Commission, 2½ per cent.,	-	144 24
		475 05
		$5,294 68

NEW ORLEANS, *8th June*, 1820.

HENRY JACKSON, & Co.

Afterwards, to wit, on the 10th day of the said month of June, in the year last aforesaid, into the court aforesaid, holden as aforesaid, came the defendants by their attorneys appointed to defend their interest, and filed the following answer, to wit:

Answer.

THOMAS KIRKMAN, jr., *vs.* HAMILTON and DONOHO. } *District Court, first judicial district.*

The answer of Hamilton and Donoho by their counsel appointed by this honorable court to represent and defend their interest, to the petition of Thomas Kirkman, jr., respectfully shews, that, reserving to themselves the benefit of all exceptions to the errors and insufficiences in the petition of said plaintiff, they do deny all and singular the allegations in said petition, and do put him to the strict legal proof thereof; and further, that no good and sufficient cause of action has been set forth in said petition. Wherefore they pray to be hence dismissed with costs.

J. A. MAYBIN, *for defendant.*

Afterwards, to wit, on the twenty-first day of June, in the year last aforesaid, at a session of the court aforesaid, holden as aforesaid, the following testimony was taken, and the following judgment was entered upon record, to wit:

Testimony.

THOMAS KIRKMAN, jr., *vs.* HAMILTON and DONOHO.

Hugh Bell, a witness on the part of the plaintiff, swears that he is well acquainted with the handwriting of Thomas Ramsey & Co., and that the

signature of Thomas Ramsey & Co. on the back of the promissory attached to the petition, is in the handwriting of said Thomas Ramsey & Co. Bille Williams, a witness produced on the part of the plaintiff, says that he is well acquainted with the handwriting of John Hamilton, one of the defendants, and one of the firm of Hamilton and Donoho, of Tennessee, and that the signature of Hamilton and Donoho to the said promissory note is in the handwriting of said Hamilton; witness says that he is one of the firm of Erwin McLaughlin & Co.

Cross-examined.

He says that the bill annexed is the bill which was accepted by H. Jackson & Co. in his favor, as stated in H. Jackson's answer; that Hamilton and Donoho were indebted to him, and he had become obligated for them to more than the amount of said bill before H. Jackson & Co. accepted it; and further, deponent says that H. Jackson & Co. have paid him the amount of said acceptance, and taken up said bill.

Principal examination continued.

That the bill has been paid by Henry Jackson since the attachment was served; that witness requested H. Jackson not to mention generally the amount Hamilton and Donoho were indebted to him. That, in saying that Hamilton and Donoho were indebted to him, and that he had become obligated for them to more than the amount of said bill, he includes the amount of a bill which has been paid to Benjamin Story; that this was a bill drawn by Hamilton and Donoho, and it became due on the 4th of May; that witness requested Story not to protest said bill, and told him that Hamilton's tobacco was on the way, and that as soon as it was sold he should receive payment; and that the 61 hogsheads of tobacco mentioned in the account sales filed by Henry Jackson & Co. were delivered to Story in payment of said bill.

William James, a witness produced on the part of the plaintiff, swears, that he is a deputy sheriff, that he served the attachment upon Henry Jackson & Co.; that, at the time, he asked Mr. Jackson whether he had property of the defendants in his hands; that Mr. Jackson answered that he had 80, 90, or 100 hogsheads of tobacco; and that he made no mention of any lien, nor of having any demands upon the property or the defendants. The witness further states, that, in another suit brought by the plaintiff against John Hamilton at the same time, he arrested said Hamilton, and William Wyer became his bail.

Cross-examined.

Witness says, that, on the occasion aforesaid, he asked Mr. Jackson if he had tobacco in his possession belonging to the defendants, but did not ask him if his house had any charges or demands against the said tobacco.

Copy of bill annexed to deposition of Bille Williams, and thereon referred.

NEW ORLEANS, 1*st May*, 1820.

GENTLEMEN: Out of proceeds of our tobacco now in your hands, or which may hereafter arrive, pay the order of Bille Williams five thousand dollars, or so much as it may amount to when sold, not exceeding that sum, for value received. HAMILTON & DONOHO.

Messrs. HENRY JACKSON & Co.

Accepted. HENRY JACKSON & Co.

Account current filed 8th June, 1820.

Dr. *Messrs. Hamilton and Donoho in account with Henry Jackson & Co.* Cr.

1820.			1820.		
Apl. 29	For one box cider - - - - -	$3 25	May 20	By cash received of Richie, Moore & Co. for freight of 4 hhds. tobacco - -	$53 75
May 6	For amount paid M. White & Co. on account of tobacco purchased of Pursley - - - -	52 23		Balance in favor of H. Jackson & Co. -	5,595 97
8	For 754 lbs. German Steel, 14 cents - - -	105 56			
	For 6 boxes cider, $3 25 - - - -	19 50			
	For our assumption of balance due by you, J. W. Hamilton, to E. Z. McLange - - - -	152 06			
12	For 1 box cider - - - - -	3 25			
13	For cash paid you, J. W. Hamilton - - -	10 00			
15	For cash paid you for boat hands - - -	300 00			
16	For our acceptance of your draft favor of Bille Williams, payable out of the proceeds of your tobacco - -	5,000 00			
17	For amount paid W. Dyson for cooperage on tobacco sold him - - - - - - - -	1 75			
20	For cash paid you, J. W. Hamilton - - -	25			
22	For 1 bottle Madeira wine, had 12 or 15 days back -	1 25			
	For drayage on still, cider, and brandy to steamboat -	62			
		$5,649 72			$5,649 72
	To balance as per contra - - - -	$5,595 97			

New Orleans, *May*, 1820.

HENRY JACKSON & Co.

15

No.

Judgment, 21st June, 1820.

THOMAS KIRKMAN,
vs.
HAMILTON and DONOHO. } No. 3,255.

This cause came on to-day to be tried before the court.

LIVERMORE, *for plaintiff.*
MAYBIN, *for defendants.*
PRESTON, *for garnishee.*

Whereupon, after argument, and the court being satisfied with the evidence offered in support of plaintiff's demand, order that judgment be entered in favor of the plaintiff against the defendants for the sum of three thousand dollars, together with interest thereon from the day of the judicial demand, to wit, the 16th day of May, 1820, till paid, and costs of suit.

Afterwards, to wit, on the 27th day of said month of June, in the year last aforesaid, at a session of the court aforesaid, holden as aforesaid, the following opinion of the court was entered upon record, to wit:

THOMAS KIRKMAN, jr.,
vs.
HAMILTON and DONOHO. } No. 3,255.

The court having maturely considered this case, to-day delivered the following opinion in writing, and ordered the same to be recorded, to wit:

Henry Jackson, the garnishee in this case, in his answer to interrogatories, admits that he has in his possession tobacco and the proceeds of tobacco to a certain amount; but that the defendants are indebted to the house of which he is a partner in the sum of $5,595 97, for which sum they have a lien on the tobacco and moneys in their hands. The claim of the garnishee is founded upon the items, viz: for commission, for moneys advanced, and for the acceptance of an order from the defendants in favor of Bille Williams for the sum of $5,000. The only doubt is, whether, under the circumstances of this acceptance, they can hold on to the tobacco or its proceeds in their hands for the amount. It seems that the defendants, Hamilton and Donoho, were indebted to Bille Williams in the sum of $5,000, for which they gave him an order on Henry Jackson, the garnishee, (and who were their consignees,) to be paid out of the proceeds of the defendants' tobacco which might then be or afterwards come into their hands. This order was accepted on the same morning, but prior to the serving of the attachment, and was afterwards paid by the garnishee. By the acceptance of this order, Bille Williams acquired an equitable interest in the proceeds of the tobacco sold, and in the proceeds of such as then, or might afterwards come into the hands of Jackson, until the amount of the order should be satisfied. From the moment the order was accepted, the defendants lost all control over the tobacco or its proceeds in the hands of Jackson; Jackson would not have been bound by their order to apply it to any other purpose, having accepted to pay the order in favor of Williams. If the defendants could not have charged the destination of these funds in the hands of Jackson—in other words, if Williams had acquired so strong an interest as could not be divested or controlled by any act of the defendants, his interest certainly cannot be lessened or changed by any act of a creditor of the defendants. The garnishee having paid the order, places himself in the shoes of Williams, and has a

right to retain in his hands so much of the proceeds of the tobacco. It is therefore ordered, adjudged, and decreed, that the tobacco which may be in the hands of the garnishee be sold; and that, after retaining in his hands the sum of $5,595 97, the amount of the commissions, moneys advanced, and the order paid in favor of B. Williams, should any balance remain, that it be paid over to satisfy the judgment obtained against the principal defendants, Hamilton and Donoho.

Afterwards, to wit, on the 14th day of July, in the year last aforesaid, into the court aforesaid, holden as aforesaid, came the plaintiff by his attorney, and filed the following petition of appeal, to wit:

Petition of appeal.

THOMAS KIRKMAN, jr., *vs.* HAMILTON and DONOHO.

To the Honorable Joshua Lewis, Judge of the district court for the first district:

The humble petition of the plaintiff sheweth: that he finds himself aggrieved by the final decree of the court refusing a judgment against the garnishee, and an order for him to pay over the proceeds in his hand coming from the tobacco attached; from which judgment in favor of the garnishee he prays an appeal.

S. LIVERMORE.

Judge's order.

An appeal is allowed, returnable on the first Monday in November next, the appellant giving bond with his security in the sum of $100, with condition to pay such costs as the court of appeal may order.

JOSHUA LEWIS.

June 28, 1820.

Bond.

FIRST JUDICIAL DISTRICT COURT.

Know all men by these presents, that we, Thomas Kirkman jr., of Tennessee, and James M. Reynolds, of the city of New Orleans, are held and firmly bound unto Henry Jackson in the sum of $100, and for the payment thereof we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents: sealed with our seals, and dated in the city of New Orleans on this 14th day of July, in the year of our Lord 1820. Whereas the above bounden Thomas Kirkman, jr., hath this day filed his petition of appeal from a final judgment rendered against him in said court on the day of ; now, therefore, the condition of the above obligation is such, that if the said Thomas Kirkman, jr., shall prosecute said appeal with effect, and shall pay and perform any judgment which may be rendered against him in the honorable the Supreme Court in this case, then the above obligation to be void and of no effect, otherwise to remain in full force and virtue.

THOMAS KIRKMAN, jr. [SEAL.]
By James M. Reynolds,
JACKSON and REYNOLDS, [SEAL.]

Signed, sealed, and delivered, in the presence of
S. LIVERMORE.

And afterwards, to wit, on the 6th day of April, in the year of 1821, at a session of the court aforesaid, holden as aforesaid, the following judgment of the Supreme Court was filed and recorded, to wit:

Decree of Supreme Court.

THOMAS KIRKMAN, jr., *vs.* HAMILTON and DONOHO. } No. 3,255.

An appeal having been taken in this case to the Supreme Court this day, Mr. Preston, of counsel for the garnishee, filed the decree rendered therein, which was thereupon ordered by the court to be recorded, and is as follows, to wit: This is a suit by attachment, wherein a quantity of tobacco was levied on in the possession of the garnishee as the property of the defendants, on which he claims a lien and preference, to be paid out of his proceeds, to the amount of $5,595 97, as their creditor, on account of a bill or order drawn by them in favor of B. Williams, and by him accepted, for $5,000, and $595 97 on other accounts. It appears by the evidence in the case, that the bill was accepted by the garnishee before the attachment was levied, to be paid out of the proceeds of the same property which was subsequently attached in his hands. As the plaintiff does not contend against the privilege and preference claimed by the garnishee to the extent of his own debt, it is only necessary to inquire what effect his acceptance in favor of Williams ought to have in opposition to the rights claimed by the attaching creditor. It has already been decided in several cases by this court, that, before the delivery of property sold, it is liable to be seized by the creditors of the seller; and, on these decisions, the plaintiff's counsel relies as applicable to the present dispute. But we are of opinion that the situation of the claimant in the cause now under consideration is clearly distinguished from that of a rendee who has not obtained a delivery of the thing sold. The garnishee does not pretend to an absolute and exclusive right of property, as in a sale: his pretensions do not extend to the entire exclusion of the plaintiff's (and appellant's) right to attach the tobacco, as would happen in the case of a rendee: he only insists on his privilege and preference as a possessor of the property of the defendants, to whom they are indebted, and on his just and equitable claim to be secured for his acceptance in favor of Williams. If he claimed as purchaser, and shewed a bona fide contract of sale made previous to the levying of the attachment, the plaintiff would fail entirely; for the garnishee was in possession of the property. Notwithstanding this clear and evident distinction between the claim of a rendee and that made by Jackson in the present case, let us suppose that it may be somewhat difficult to discover any sound reason why a fair purchaser, who has paid the price of the thing bought, when the sale is unaccompanied by tradition, should be placed in a worse condition than a factor who claims certain liens on the goods in his possession; to such difficulty and doubt, (if they really do exist,) it might be answered, that, in relation to sales, the rules are positive, clear, and explicit as laid down by the laws of the State; whilst commercial transactions (purely such) are to be governed by the usages and customs of merchant or *lex mercatoria*. Considering the right and claim of the garnishee in this case under the government of the law merchant, we have not the least doubt of their legality and equity: when the owner of the property is justly indebted to his factor or agent who has it in his possession, or when the latter has accepted the bills of the former, or in any other manner bound himself for his principal to a third person on the faith and credit arising from property thus possessed by him, we are of opinion that it would be unjust and illegal to prefer the rights of an attaching creditor to that of the factor, wherein the

transactions between the principal agent are in the usual and fair course of trade, 279 and 4, 258 to 263 is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

STATE OF LOUISIANA, FIRST JUDICIAL DISTRICT COURT.

I, Martin Gordon, clerk of the first judicial district court of the State of Louisiana, do hereby certify that the foregoing 17 pages do contain a full and complete transcript of the record now in the files of this court under the No. 3,255, in the case of T. Kirkman, jr., *vs.* Hamilton and Donoho.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, on this 13th day of December, in the year of our Lord 1822, and the 47th year of the independence of the United States. MARTIN GORDON, *Clerk.*

I, Joshua Lewis, sole Judge of the district court in and for the first judicial district of the State of Louisiana, do hereby certify that M. Gordon is clerk of the said court, and that the signature, Martin Gordon, clerk, to the above certificate subscribed, is in the proper handwriting of him, the said clerk. To his official acts as such, full faith and credit ought to be given. And I do further certify, that his certificate is in due form of law.

Given under my hand and seal, at the city of New Orleans, on this 13th day of December, A. D. 1822.

JOSHUA LEWIS.

And the said cause was continued from term to term until this term. And now, at this day, to wit, the first above mentioned, came the parties by their attorneys; and thereupon came, also, a jury of good and lawful men, to wit, John T. Moore, Lucius J. Polk, James Patterson, Joseph Rolb, James Charlton, Obadiah J. Finley, George H. Bullard, Ransom Guyson, David Gillespie, Micajah G. Lewis, William Armstrong, and Moses Ridley, who, being elected, tried, and sworn the truth to speak upon the issue joined, upon their oaths do say, they find the second count of the declaration in this cause in favor of the plaintiff; and that the defendants have not paid the debt of three thousand dollars in said second count mentioned, or any part thereof, as in pleading they have alleged; and they assess the plaintiff's damage by reason of the non-payment thereof to seventeen hundred and two dollars fifty cents, besides costs. And the jury aforesaid, upon their oaths aforesaid, do say, they find the issues upon the first and third counts of said declaration in favor of the defendants. And on the 23d day of the present term of said court, was made the following order: Upon the argument of the demurrer in this cause, as applicable to the plea of the statute of limitations to the second count in the plaintiff's declaration, the court are divided in opinion upon the following questions: Whether the plea of the statute of limitations is a bar to the recovery of the plaintiff on the second count in the declaration, and whether an action of debt can be supported on the cause of action set forth in said second count; whether the averment of the citizenship of Thomas Ramsey & Co., the payers of the note in the said second count, is sufficient to sustain the jurisdiction of this court under the provisions of the eleventh section of judiciary act of 1789. Which certificate of division of opinion is ordered to be certified to the Supreme Court of the United States, according to law.

UNITED STATES OF AMERICA, DISTRICT OF WEST TENNESSEE.

I, Nathaniel A. McNairy, clerk of the courts of the United States for the district aforesaid, held at Nashville, do hereby certify that the foregoing is a true transcript of the record, Thomas Kirkman, jr., *vs.* Hamilton and Donoho, and also a true copy of the transcript of the record of the State of Louisiana, the first judicial district court, in the suit Thomas Kirkman, jr., *vs.* John W. Hamilton and Thomas Donoho.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Nashville, on this 11th day of November, in the year of our Lord one thousand eight hundred and twenty-nine, and the fifty-fourth year of the independence of the United States.

[L. S.] N. A. McNAIRY, *Clerk.*

SUPREME COURT OF THE UNITED STATES.

No. 26

BANK OF THE UNITED STATES, PLAINTIFF,

VERSUS

WILLIAM GREEN ET AL.

CERTIFICATE OF DIVISION IN OPINION.

Pleas begun and held at the court-house in the town of Columbus on the second Monday of July, being the thirteenth day of the same month, in the year of our Lord one thousand eight hundred and twenty-nine, and of the independence of the United States of America the fifty-fourth, before the Honorable John McLean and John W. Campbell, Judges of the circuit court of the United States for the seventh circuit and district of Ohio.

BANK OF THE UNITED STATES *vs.* WILLIAM GREEN, &c.

Be it remembered, that heretofore, to wit, at the July term of the seventh circuit court of the United States within and for the Ohio district, upon motion of the defendants, a rule is given on the marshal and the plaintiffs to shew cause on Monday, or as soon thereafter as the same can be heard, why the taxation of costs in this case upon execution should not be revived and corrected in respect to the marshal's poundage taxed against the defendants. And thereupon the rule in this cause was argued by counsel, but the court not being fully advised, &c., took time, &c., until the next term: at which said next term, being the December term, which was begun and held on Monday the twenty-second day of the said month of December, in the year of our Lord one thousand eight hundred and twenty-eight, come again into court here the said parties, by their attorneys; and thereupon further proceedings in this cause is continued until the next term. And now at this term, to wit, the July term, which was begun and held at Columbus on Monday the thirteenth day of the same month, in the year of our Lord one thousand eight hundred and twenty-nine, came the parties, by their attorneys, and also William Doherty, the late marshal, by Wright, Brush, and Doddridge, Esquires, his attorneys, to shew cause against the said rule, and in support of the taxation of poundage complained of. Upon shewing cause, it appeared that, on the 30th day of September, 1824, the plaintiff sued out of this court a writ of fieri facias et levari facias against the goods and chattels, lands and tenements of Jacob Burnet, James Findlay, William

H. Harrison, and Martin Baum, the heirs and representatives of William Green, deceased, for $61,140 49, with interest from the 5th September, 1821, until paid, returnable the first Monday in January, 1825; on which said writ was endorsed by the parties an agreement waiving any levy on goods and chattels, and that a levy should be made on real estate; in pursuance whereof, the marshal made return of a levy on various parcels of real estate in the city of Cincinnati and elsewhere, that he had sold the same, and made part of the money, but had made no farther levy for want of time. This return was made first Monday of January, 1825. It further appeared, upon a further process on the same judgment, a further levy was made on real estate, the sale of which was stayed by plaintiff; and that, for the sale of various parcels of real estate so levied by the marshal, the plaintiff, on the 9th day of April, 1827, issued out of this court upon the said marshal's return a writ of venditioni exponas, returnable to the second Monday of July, 1827; which writ the plaintiff's agent returned to the clerk's office the 5th July, 1825, not having placed the same in the hands of the marshal, but having received satisfaction of the judgment from the defendants. It further appeared that the marshal, upon the last mentioned levy, endorsed the taxation of his poundage at $792 50, under the act of Congress, which is the taxation complained of, and sought to be reversed and corrected by the said rule nisi. It further appeared that by a law of the State of Ohio, passed the 19th February, 1824, and then and ever since regulating the fees of certain officers, the poundage of sheriffs, on writs of executions from all courts of the said State, is granted by a single clause in the following words: "poundage on all moneys made on execution two per cent.," which then was and still is the only law of the State regulating or granting poundage. The whole of the law of Ohio is referred to as a part of this statement. It further appeared that, at the December separate session of the Supreme Court of Ohio in the year 1826, in the case of Vance against the Bank of Columbus, that court decided that the words "money made on execution" in the above clause could only relate to such sums as are actually paid into the sheriff's hands "upon the execution," and not to such sums as are actually paid to the creditor. It also appeared that no counsel appeared in that case for the sheriff. It further appears, that in the taxation aforesaid complained of in the rule, the marshal claimed and taxed the rate of poundage allowed by the before mentioned act of Congress. In shewing cause the following questions arose, upon which the opinions of the Judges were opposed, and which, on the request of the marshal by his said attorneys, are here stated, and ordered to be certified by the clerk of this court, under the seal thereof, to the Supreme Court of the United States, at their next term, for their decision, viz:

First. Whether the marshal's poundage on moneys collected, made, or paid on executions issued out of a circuit or district court of the United States, is confined and regulated by the following words, viz: "For sales of vessels and other property, and for receiving and paying the money, for any sum under five hundred dollars two and one half per cent.; for any larger sum, of one and one quarter upon the excess," in the first section of the act of Congress, passed 28th February, 1799, entitled "An act for providing compensation for the marshals, clerks, attorneys, jurors, and witnesses in the courts of the United States, viz: for all other services not herein enumerated, except as shall be hereafter provided, such fees and compensation as are allowed in the Supreme Court of the State where such services are rendered."

Second. If regulated by the words first mentioned, then whether the marshal's poundage attaches upon a levy and return, where afterwards the debt shall be paid to the party, or only accrued upon a sale and receipt of the money and paying it over by him? or,

Third. Whether the marshal's poundage is confirmed by the before mentioned words in the proviso, and are in the cause here stated to be regulated by the before mentioned law of Ohio?

Fourth. If the marshal's poundage in the cause here stated is to be regulated by the law of Ohio, then whether, by a just construction of that law, poundage is due upon the levy and return in question? or,.

Fifth. Is this court bound by the construction of that law given by the Supreme Court of Ohio?

THE UNITED STATES OF AMERICA, } *sct.*
District of Ohio, }

I, William Miner, clerk of the seventh circuit court of the United States in and for the district of Ohio aforesaid, do hereby certify the aforegoing to be a true transcript of the proceedings on a certain rule, lately pending and undetermined in said court, in a case in which the president, directors, and company of the Bank of the United States were plaintiffs, and William Green and others were defendants, as the same now stand among the files of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, the 25th day of December, in the year of our Lord one thousand eight hundred and twenty-nine, and of the independence of the United States of America the 54th.

Attest. WILLIAM MINER, *Clerk.*